HAJI ABU KASSIM v. TEGAP CONSTRUCTION SDN. BHD.

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) March 9 & May 5, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 220 of 1979]

Contract — Building Contract — Progress payment certified by architect — Valuation obtained from another firm of valuers — Termination of contract — Breach of contract — Liability of owner.

In this case the appellant had entered into a contract with the respondent whereby the respondent agreed to construct shop houses for the appellant. The appellant terminated the contract. At the material time the shop houses were not fully completed and two progress payments for the works as certified by the architect had not been paid. It appeared that the appellant was not satisfied as to the correctness of the valuation made by the architect and he had obtained a valuation report from a firm of valuers. The respondent claimed the sums certified by the architect.

The learned trial judge found that the termination of the contract by the appellant was bad in law and that the appellant had himself committed a breach of the agreement in that he failed to honour the architect's certificates. He also found that there was no proof that the respondent had used inferior materials, goods or workmanship as alleged and he rejected the report of the valuers and accepted the valuation given by the architect.

The appellant appealed.

Held: the questions the learned judge had to decide were essentially questions of fact and the appeal court would not normally interfere with such findings. In this case the learned judge had rightly arrived at the decision he did.

FEDERAL COURT CIVIL APPEAL.

Abdul Razak bin Ahmad for the appellant.

Foo Sam Ming for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appellant is dissatisfied with the decision of the High Court Johore Bahru ordering that judgment in the sum of $140,191, costs and interest be entered against him on a claim made by the respondent contractor, Tegap Construction Sdn. Bhd. for the construction of six units of 3 storey shophouses under an agreement entered into between the parties on June 18, 1977. On June 11, 1978, the appellant terminated the contract. At the material time the shophouses were not fully completed and two progress payments for the works done as certified by the architect had not been paid.

Anuar J. in his judgment found that the termination of the contract by the appellant was bad in law, the appellant himself had committed a breach of the agreement in that he failed to honour both the architect's certificates. He also found that there was no proof that respondent had used inferior materials, goods or workmanship. As for the valuation of the works done, the learned judge rejected the report given by Messrs. C.H. Williams and accepted the valuation given by the architect.

At the hearing of the appeal, Encik Abdul Razak counsel for the appellant raised two grounds as follows:—

(a) the failure of the learned judge to consider the breaches of the agreement by the respondent as set out in paragraph 2 of the statement of defence (page 11 of the appeal record);

(b) the failure of the learned judge to consider that the certificate issued by the architect was grossly incorrect and inflated and there was dishonesty committed by the architect.

One of the complaints raised was that the respondent used inferior materials. In this respect there was hardly any evidence adduced to support the allegation. Furthermore, the report given by Messrs. C.H. Williams also made no mention whatever on the quality of materials or goods used. The complaint is in our view completely without merit. There is on the other hand ample evidence to warrant the learned judge's finding that the appellant had breached the agreement when he failed to satisfy the two progress payments. It is in evidence that at the relevant time the appellant had not the necessary funds to make the payments. Initially there was no question of any refusal on the part of the appellant to pay. It was only subsequently that he refused to pay on the ground that the respondent had committed a breach of the agreement.

As for the appellant's contention that the certificates given by the architect was grossly incorrect and inflated reliance is placed upon the fact that (a) nothing is stated on the certificate as to the portion of the progress payment that shall be retained by the appellant, and (b) in the certificate the contract sum is shown as $360,000 whereas the actual sum is $312,000. In this regard we find that these matters were not specifically raised by the appellant in his statement of defence except for a general allegation of breaches of the agreement. Incidentally these were not the real reasons the appellant refused to make the payments. There was every opportunity to raise these matters with the architect but the appellant completely failed to do so. He did not in fact dispute the correctness of the certificates except subsequently when he objected to the valuation.

In the statement of defence there is also an allegation of dishonesty but clearly it lacks particulars to merit any consideration by the court below. In essence the crux of the matter is that the appellant, on the advice given to him by a friend of his from the Public Works Department, became suspicious as to the correctness of the valuation made by the architect. Consequently he secured the services of Messrs. C.H. Williams to evaluate the works done. The valuation report was rejected by the learned judge on grounds fully set out in the judgment.

In arriving at our decision, it is essential to bear in mind that the questions the learned judge had to decide were essentially questions of fact and this court will not normally interfere with such findings. On the materials before the court, it was clearly a question of deciding whether the valuation report by Messrs. C.H. Williams could be accepted in preference to the report of the architect. The learned judge dealt with the question at length stating and I quote:

"I am constrained to say that I cannot accept the valuation report put up by Shamin whose basic qualification is B.Sc. Estate Management. He admitted in his evidence that he was not a qualified quantity surveyor. He also admitted that he had not inspected the site, he merely had a plan given to him by Kamal & Co. which however was not a certified copy.

Shamin carried out the assessment, in his own words, 'to the best of my ability'. He had no idea as to the valuation of the goods and materials used by the contractor. He had no idea as to the quantity of work done with regard to the reinforced concrete. In fact he did the valuation purely on visual assessment. In the event I do not think the valuation report as put up by Shamin can be relied upon. I would therefore disregard this report and accept the valuation put up by the Architect."

With the greatest respect to the argument put forward by counsel for the appellant, we are firmly of the view that there is no merit whatever in the argument and we are satisfied that the learned judge had rightly arrived at the decision that he did.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Ong Ban Chai & Razak; Foo & Woon.*

VASUDEVAN v. T. DAMODARAN & ANOR.

[F.C. (Raja Azlan Shah C.J., Wan Suleiman F.J. & Abdoolcader J.) April 21 & May 30, 1981]

[Penang — Federal Court Civil Appeal No 262 of 1980]

Practice and procedure — Application to have action dismissed for want of prosecution — Inordinate delay — No credible excuse — Exercise of discretion by trial judge in dismissing the action — Appeal Court will not interfere.

In this case the second respondent with the support of the first respondent applied by summons for the action to be dismissed for want of prosecution. The appellant's writ in this case had been issued some ten years after the initial accrual of the cause of action. Seven years after the institution of the suit no notice of trial had been given, no summons for directions issued, no discovery made and no steps whatsoever taken to set the action down for trial. The learned trial judge made an order dismissing the action and the appellant appealed.

Held: (1) the delay in this case was inordinate and inexcusable and there were substantial grounds for holding that the respondents had established the matter of a substantial risk of a fair trial not being possible after this long lapse of time and of serious prejudice as a result of the inordinate and inexcusable delay on the part of the appellant;

(2) the learned judge was wholly correct in the exercise of his discretion in the matter and there was no reason to interfere with his decision.

Cases referred to:-

(1) *Birkett* v. *James* [1978] A.C. 297, 317, 326.

(2) *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, 245, 268.

(3) *Bremer Vulkan Schiffban Und Maschinen-fabrick* v. *South India Shipping Corporation* [1981] 1 All E.R. 289; 2 W.L.R. 141.

(4) *Biss* v. *Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 W.L.R. 382, 389.

(5) *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130, 148.

(6) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

(7) *Evans* v. *Bartlam* [1937] A.C. 473.

(8) *Ward* v. *James* [1966] 1 Q.B. 273.

(9) *Re Reed (a debtor)* [1979] 2 All E.R. 22, 25.

(10) *Damodaran* v. *Vasudevan* [1975] 2 M.L.J. 231.

(11) *T. Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267; [1980] A.C. 497.

(12) *Pryer* v. *Smith* [1977] 1 All E.R. 218.

(13) *Eaton* v. *Storer* (1882) 22 Ch. D. 91, 92.

FEDERAL COURT CIVIL APPEAL.

Subash Chandran for the appellant.

Wong Chong Wah for the 1st respondent.

T. Rajamoorthy for the 2nd respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court):

THE ISSUE

No notice of trial has been given, no summons for directions issued, no discovery made and no steps whatsoever taken to set the action down for trial and proceed to a conclusive determination of the proceedings — all this coming on to 7 years after the institution of the suit which itself was some 10 years after the initial accrual of the cause of action on which the appellant's writ was founded, an aggregate of well-nigh 17 years. In the event the 2nd respondent with the ardent support of the 1st respondent applied by summons on May 5, 1980 for the action to be dismissed for want of prosecution and B.T.H. Lee J. acceded thereto and made an order accordingly on October 18, 1980.

The question for determination in this appeal is whether in the circumstances of this case in the light of the relevant principles of law there are any grounds for us to interfere with the exercise of his discretion by the learned judge in making the order that he did.

THE LAW

It would perhaps be more convenient and appropriate in this case to transpose the normal sequence and deal with the principles of law arising for consideration and application to the facts of the matter before adverting to the history and factual background of these proceedings. The principles involved pertain to the dismissal of an action for want of prosecution and the circumstances in which an appellate court will interfere with the discretion of a court of first instance.

(a) *Dismissal of action for want of prosecution*

The House of Lords in *Birkett* v. *James*,[1] approving the decision of the English Court of Appeal in a trilogy of appeals reported *sub nomine Allen* v. *Sir Alfred McAlpine & Sons Ltd.*,[2] held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curiam* that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules